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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-990

IN RE: Estate of

OTIS O. SWEET, *Deceased.*

WILLIAM D. SWEET, DELOCA I. GREEN,
CYNTHIA E. BENNETT, SHERMAN L. SWEET
and FLORENCE BUTLER, a/k/a FLORENCE SWEET,
Petitioners

v.

CHARLES H. SWEET, as Ancillary Administrator
Respondent.

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

The respondent, Charles H. Sweet, as Ancillary Administrator, files this his brief in opposition to the petition for writ of certiorari. We will refer to the parties as they stood below as petitioners, petitioners here, and the respondent, Charles H. Sweet, as Ancillary Administrator. We will refer to the transcript or record by the symbol "R".

STATEMENT OF THE CASE

The respondent, Charles H. Sweet, on May 11, 1970, filed his petition, as domiciliary administrator, to qualify himself in the County Judge's Court, Polk County, Florida, based upon exemplified copies of his due qualification in Cook, County, Illinois (R. pages 1 to 6). Two heirs resided in Detroit, Michigan, one in Cleveland, Ohio, one in Chicago, Illinois, and three in Florida, two of which lived in Bartow, Polk County, Florida.

On May 11, 1970 the Ancillary Administrator filed his inventory of assets, listing the real property as the only asset in Florida at a value of $43,500.00 (R. page 8).

On October 9, 1970, the Ancillary Administrator filed his petition for order authorizing conveyance pursuant to contract of decedent. Two separate petitions on two even dated contracts (R. pages 9 and 14). The first petition was on a contract that provided a purchase price of $27,500.00, with a binder payment of $2,750.00. The second petition was on a contract that provided a purchase price of $16,000.00 with a binder payment of $200.00. Each contract had conditions such as, "FHA site approval, abstract of title, and marketable title".

On November 16, 1970, three of the petitioners here involved in this appeal filed their petition to revoke ancillary administration (R. pages 19 to 21). This petition seeked to attack the validity of the appointment of the domiciliary administrator in Cook County, Illinois, no notice of application in Cook County, Illinois, no consent by heirs to sell real property in Florida, except by Charles H. Sweet, the Ancillary Administrator, and asserted that reason to sell to pay unpaid obligations.

The County Judge, Polk County, Florida, upon Motion to Strike entered his Order striking the petition as frivilous and without legal basis in law or fact. (R. page 22). We quote from

the learned trial judge as follows:

> "IT IS ORDERED AND ADJUDGED by the court as follows:
>
> 1. x x x
>
> 2. That these proceedings, ancillary to the domiciliary proceedings pending in Cook County, Illinois, and the said Charles H. Sweet as domiciliary administrator, is and was entitled to preference, and his duties required that he institute ancillary proceedings in the county wherein is located real estate owned by the decedent at the time of his death.
>
> 3. That the order authorizing sale of real estate owned by the decedent at the time of his death was made pursuant to a valid contract made and executed by the said decedent prior to his death. x x x."

We agree with petitioners interposed statement in their brief that an appeal was filed challenging this order, and after a long lapse of time the appeal was dismissed for failure to prosecute.

On November 2, 1971, the Ancillary Administrator filed his petition for order discharging administrator and set forth the facts as follows: (R. page 24).

> "1. x x x
>
> 2. That the petitioner, as Ancillary Administrator, has faithfully administered said estate in the ancillary administration and he has obtained and filed herein a certificate of non-tax liability issued by the State Comptroller of the State of Florida, and the petitioner as ancillary administrator has filed herein receipt of the domiciliary administrator for all moneys and assets by him received in these proceedings, and there is no real property known to the petitioner remaining in the State of Florida. The petitioner has paid

all expense of ancillary proceedings, including attorney's fees to his attorney of record, R. B. Crawford, Jr., and nothing remains to be done herein and these proceedings should be closed by the order of this court to be concluded in the domiciliary administration of said decedent in Cook County, Illinois."

x x x.

Thereupon, an order was made and entered by William K. Love, Circuit Judge as pro hac vice County Judge, on November 2, 1971 (R. Page 26) as follows:

"1. x x x

2. That the ancillary administration proceedings herein be, and the same is hereby, closed to be concluded in the domiciliary administration of the estate of said deceased, and that the said Charles H. Sweet, as Ancillary Administrator in these proceedings be, and he is hereby, finally discharged, and that his surety, The Fidelity and Casualty Company of New York be likewise discharged from further liability.

x x x."

Subsequently, the petitioners below filed a petition to reopen estate and set aside order of discharge of ancillary administrator, on January 26, 1972 (R. pages 27 to 29). This petition added the sister-in-law of the decedent, Otis O. Sweet, as an heir at law of said deceased. This petition is similar in tone and tenor to the petition filed on November 16, 1970, supra, (R. pages 19-21). The first petition averred that the real property was valued at more than $56,000.00, while the last petition averred that it's value was presently valued at more than $75 to $80,000.00 dollars, now the petitioners allege $100,000.00; and now question the authenticity of the contracts under which the real property was sold; and again raise

the point that no notice was given to the heirs that the property was to be sold under a contract of the decedent, Otis O. Sweet.

After hearing, over objections of the attorney for the respondent, Charles H. Sweet, the ancillary administrator, the learned County Judge, the Honorable Richard A. Bronson, entered his order denying the petition (R. pages 69-70) on April 13, 1972, and, inter alia, said as follows:

"x x x

1. That the proceedings had herein in the ancillary administration are regular and complete in every respect, and terminated by order of discharge of ancillary administrator on November 2, 1971, to be concluded in the domiciliary administration in Cook County, Illinois.

2. That said petition seeks to evade written contracts of real property made and entered into in the decedent's lifetime, which contracts had specific terms and conditions of sale F.H.A. site approval, and subject to re-zoning, and also required seller to deliver abstract of title, and provided for closing after approval of title; in each instance the purchaser gave a binder payment equal to ten per cent of the purchase price; in no instance is there any showing of any forefeiture after fulfillment of conditions of sale prior to confirmation of sale pursuant to the decedent's written contracts of sale.

3. That pursuant to the petition of the ancillary administrator, Charles H. Sweet, showing that all expenses of administration and claims had been paid pursuant to Rule 5.450 Rules of Probate and Guardianship Procedure, and receipt of the domiciliary administrator for all remaining personal property,

the court pursuant to said rule entered its order on November 2, 1971, closed these ancillary proceedings to be concluded in the domiciliary administration and discharged the ancillary administrator. There remained nothing to be done in this court as the ancillary administrator had to make final accounting in the probate court of Cook County, Illinois, and there obtain an order of distribution to finally conclude the administration.

4. That the said petition is without merit and the same untenable.

x x x"

The hearing of February 14, 1972, (R. pages 30 to 69) made proffert of testimony, objected to by council for the respondent. The only excerpts argued by the petitioners are a portion of the testimony of petitioners witness, Max Thornberg, who identified himself as a real estate broker in Jacksonville, Florida (R. pages 50 to 56). He testified that he examined comparable sales of properties. His appraisal was on Tuesday before the hearing, "After talking with several that had been asked to purchase property, they were offered the property for $2,600.00 per lot. After considering all the improvements and what not and the manual states that we can get six lots per acre after subdividing, I allowed for 90 lots and the total value of this appraisal came to 135 thousand dollars." x x x "I allowed for that in the appraisal because I know it costs to subdivide and that's why I made the figure for $1,500.00 a comparable figure" (Emphasis supplied) (For understanding, the appraiser got his comparable value out of the developed subdivided lots of the lands here involved, not from other like property sales in the community).

Completely absent from the record is any affirmative procedure in the probate Court of Cook County, Illinois to upset the authority of the respondent as domiciliary administrator for his letters of administration.

STATEMENT OF FACTS

We have adequately stated the facts of the case in the petitioner's statement of the case. By the very nature of these proceedings, ancillary administration, the petition and orders embrace the case and facts.

We must however point out that the petitioners are rather incorrect in their effort to enterject matters outside the record.

In the first instance this appeal is concerned only with the last petition and order denying the petition to "reopen estate" and to set aside the discharge of ancillary administration. To be sure the last petition is for all practical purpose a repeat of the petition filed on November 16, 1970, upon which the probate judge entered his order striking the petition for lack of merit. A notice of appeal was filed in due season, but the appellants, same petitioners here with the addition of the decedent's sister-in-law, saw fit to and did abandon that appeal.

The tenor of the utterings of the petitioners is their misconception and assertions that the Administrator sold the real property here involved for $43,500.00, and they refused to perceive that the decedent by his own hand sold the property by his written contract in his lifetime and the contract was yet outstanding at the time of his death.

JURISDICTION

The petitioners seek to urge upon this court a constitutional question of lack of due process in the ancillary proceedings in the probate court of Polk County, Florida. They overlook the jurisdictional fact that the domiciliary probate court in Cook County, Illinois first conferred authority of the Administrator. Under the authority of letters of administration, he proceeded entirely properly in ancillary administration in the court below.

Petitioners Posed the Questions Presented as follows:

1. Whether the sale of real property of a deceased person pursuant to an order entered by a probate court upon petition to sell said property filed by the administrator without notice of the hearing before the probate court on the petition having first been given to the known legal heirs was a denial of the due process of law to the legal heirs as guaranteed under the Fourteenth Amendment to the U.S. Constitution where the addresses and whereabouts of the heirs were known and filed in the records of the probate court and were under Florida State Law, the fee simple title to said lands vested in the decedent's legal heirs upon his death and the subsequent sale of said land divested the legal heirs of their fee simple title in land.

2. Whether Florida Statute 733.26 is unconstitutional on its face or in its application, when it permitted sale of real property of a deceased person pursuant to an order entered by a probate court upon a petition to sell property, filed by the administrator without notice of the hearing before the probate court on the petition having first been given to the known legal heirs and where the addresses and whereabouts of the heirs were known and filed in the records of the probate court and where under Florida State Law the fee simple title to said land vested in the decedent's legal heirs upon his death and subsequent sale of said land divested the legal heirs of their fee simple in said land.

OBJECTIONS TO GRANTING THE WRIT

Florida Statutes recognize a foreign representative and provides that, "Personal representatives who produce probate of wills or letters of administration duly obtained in any of the States or territories of the United States and authenticated under Act of Congress of May 26, 1790, shall be authorized to maintain actions in the several courts of this State under the rules and regulations as other plaintiffs x x x" F.S.A. Section 734.30 (Laws 1945, C. 22738 same). The same statutes provides that a foreign representative may be sued and he may defend. After three months a resident may deal directly with the foreign representative regarding tangible or intangible property belonging to the estate of a decedent. These provisions are in full recognitions of letters issued by a foreign sister state without ancillary proceedings.

The petitioners erroneously contend that an ancillary administration of a decedent's estate is precisely the same as domiciliary administration.

In the first instance a domiciliary personal representative has the duty to make application for ancillary proceedings when any non-resident leaves assets in this State. Upon his application have ancillary letters issued to him, if qualified to act.

We quote from Section 734.31(1) and (2) F.S.A. as follows:

> "(1) Upon the death of a nonresident of this state leaving assets in this state, credits due him from residents of this state, or liens upon property in this state, the domiciliary personal representative of such decedent may, upon application, have ancillary letters issued to him, if qualified to act. Otherwise, the preference of appointment prescribed in this law shall be applicable. If ancillary letters are applied

for by other than the domiciliary personal representative, citation shall be served upon the domicillary personal representative.

(2) To entitle such applicant to ancillary letters, there shall be filed with the petition a duly certified copy of so much of the domiciliary proceedings as will show either (a) the will, petition for probate, order admitting the will and letters testamentary, if there are such; or (b) the petition for letters of administration and letters of administration."

First in order of preference is the domiciliary personal representative. It is his qualifications that warrant his right to letters ancillary to the domiciliary proceedings, and this does not contemplate his renoticing the same heirs at law.

The petitioners insist that they should have been given notice of the sale of real property. None claim ignorance of the fact that the real property here involved was owned by the decedent, yet they make no noise in these proceedings, ancillary or domiciliary, until some eleven months after death, seven months after qualification of the domiciliary legal representative, and six months after his qualification as ancillary representative. If they did not know that an administration was pending, just why didn't they seek the qualification of a qualified administrator?

We quote from PGR Rule 5.450(a) as follows:

"Rule 5.450(a): To entitle an applicant to ancillary Letters, a petition shall be filed with an authenticated copy of so much of the domiciliary proceedings as shows either (1) the will, petition for probate, order admitting the will to probate and letters testamentary, if there are such; or, (2) the petition for letters of administration and letters of administration."

Thus it appears here that an applicant, otherwise qualified to act, and first entitled to preference, is entitled to ancillary letters upon his application. This in view of the obligation of provisions of Section 734.31 (1) and (2) supra indicates the law expects the domiciliary legal representative to aid and extend his own administration in the State of Florida.

Thus, we may safely conclude that the respondent here was both qualified to act as and to apply for ancillary letters predicated upon exemplified copies of petition for letters of administration and letters of administration in Cook County, Illinois.

The petitioners ignored the fact that they had abandoned an appeal on a like petition filed November 16, 1970, finally disposed of by final order dated December 8, 1970. Nevertheless, they now tell this court that they are appealing all orders entered by the County Judge in this administration.

The petitioners rather indignantly insist that they should have been given notice of the petition to sell and convey pursuant to contracts of decedent. Ample authority is given to the legal representative by Florida Statutes, dated back to Laws of 1933.

We quote from Section 733.32 F.S.A. as follows:

"In all cases where written agreements have been made for sale and conveyance or transfer of real property in this state x x x, and the vendor has died before making such conveyance or transfer, the personal representative x x x may file with the county judge before whom the administration of the estate is pending a sworn petition setting forth the facts upon which the claim is predicated and annexing thereto the agreement or a copy thereof, x x x"

We continue from the same Section, as above, and as follows:

> "The county judge, if he deems notice of hearing on said petition necessary or desirable, shall direct who should have the same and the manner in which it should be given. (Emphasis supplied). x x x Said order shall be prima facie evidence of the validity of the proceedings and the authority of the personal representative to make the conveyance or transfer, x x x".

In the instant case, the county judge did not see fit to require notice to any person, firm, or corporation. Our worthy adversary is just unwilling to accept the law that proceedings in the county judge's court and the orderly gathering and ultimate distribution of the assets of a decedent's estate are a matter of administrative law and do not originate or proceed as adversary proceedings. Each affirmative procedure does not require notice and opportunity to be heard to and until such time as the county judge may so require or interested heirs, devisees, or legatees have made, filed and served a written notice that they have elected to so require notice from the legal representative.

Not in conflict with the last cited statute, Chapter 733 of Florida Probate Law, specifically and in understandable language sets forth "When notice of sale required". We quote from Section 733.26 F.S.A. as follows:

> "(1) No notice of any application for authorization or confirmation of any sale shall be required when it shall appear that personal property involved is perishable x x x"
>
> "(2) No notice of any application for authorization or confirmation of any sale shall be required in any other case except as follows:
>
> (a) When it shall appear to the county judge that notice is necessary or desirable, x x x.

(b) x x x

(c) Whenever any person interested in the estate shall serve upon the personal representative a written demand for notice of sale, containing the post office address of such person, file a copy of such demand and proof of service thereof in the office of the county judge, x x x".

The petitioners make no effort to show that the probate judge required any notice, and neither do they contend or attempt to demonstrate that any of them have made, served or filed a written demand for notice of any kind.

Further, the applicants were perfectly content to try to urge upon the County Judge the proposition that no person, nor heir, except Charles H. Sweet, had agreed to sell the real property here involved, when the County Judge had before him the contracts to sell real property duly and regularly executed by the decedent. The best we can get out of their arguement, the petitioners expect the courts to ignore the written contracts of the deceased.

Petitioners also urge upon the appellate court that the contracts sued upon which each expired by the terms of the contract, and point out to the court an isolated provision that – "x x x this transaction shall be closed and purchaser pay the balance of the first payment and execute all papers necessary to be executed by him for the completion of this purchase within 90 days from delivery or tender of an abstract of title of the said property, x x x" (R. page 11).

However, the petitioners fail to point out when the abstract was delivered. Perhaps they should have asked.

Also, petitioners fail to heed the "Terms and Conditions of sale" (R. page 11) which required, "FHA site approval for one of the following: Multiple dwelling, nursing home or convalescent home". x x x Buyer or agent may enter upon the property for borings and inspections."

No one, not even the petitioners, has tried to urge upon the court that any notice of forfeiture was ever made or attempted to be made.

In the case before the bar the respondent in the County Judge's Office complied with every requirement of the law as to his qualifications and all authority to act. We think the respondent has satisfied the court that he was under no obligation to give notice to any heir or heirs. The learned County Judge did not see fit to require notice, and a late comer cannot now impose such requirement when the County Judge did not.

Our adversary has questioned the lack of due process of law under Florida Probate Law. We have successfully demonstrated that under applicable statutes no notice was required, and the petitioners took no affirmative steps to require notice to them or any of them.

We quote from, In Re: Estate of Minnie E. McVay, Fla. 226, So. 2nd 706, as follows:

> "The jurisdiction of the County Judges in such cases, pursuant to Article V, Section 733.32 F.S.A. has been recognized by this Court in In Re Shepherd's Estate, Fla. App. 1961, 130 So. 2d 888 (Other cases cited)".

In our efforts to find an explanation for petitioners null hypothesis, we suggest that perhaps they expect the ancillary proceedings to be concluded by publication of notice of application for order approving account, directing distribution, distribution by the ancillary administrator, and ultimate final discharge, all in the County Judge's Court, Polk County, Florida.

All contractual obligations which survive the death of the obligor are binding on his executors and administrators in their representative capacity and may be enforced against his estate. (See 31 Am Jur 2d, Executors and Administrators, Section 318).

The domiciliary administrator has long since receipted for all moneys and assets, obtained and filed a certificate of non-tax liability issued by the Comptroller of the State of Florida; he paid all expenses of ancillary administration, and no real property remained in Florida. (R. page 24).

We quote from P G R, Rule 5.450(d), as follows:

"(d) After the payment of all expenses of administration and claims against the estate the court may, upon petition, order the remaining personal property in the hands of the ancillary personal representative to be transferred to the domiciliary personal representative." (See also Section 734.31(5) F.S.A. 1972, like wording).

Substantially, that is what was done in the instant case.

It seems that a lot of the petitioners labor could have been saved by asking rather than opposing. Salient facts are that (1) the ancillary administrator was qualified in the probate court of Cook County, Illinois, (2) he made due application for letters ancillary in Polk County, Florida, (3) the decedent made, executed and delivered a good contract for sale of the lands here involved for a substantial binder payment, and (4) the County Judge authorized and directed conveyance upon the payment of the balance of purchase price. The administration of the Estate of Otis Q Sweet, deceased, is to be concluded by the domiciliary administrator in Cook County, Illinois.

After two years, do the petitioners really contemplate return of purchase money and payment of betterments on improved developments? We wonder!

CONCLUSION

We conclude, therefore, as follows:

1. The ancillary administrator may sell real estate pursuant to contract of decedent upon the approval of the County Judge.

2. The sale of property pursuant to the written contract of the decedent upon order of the County Judge is not lacking in due process of law.

3. The ancillary administrator is not required to give notice to any heir at law who has not served and filed written request for notice of proceedings in administration of the decedent's estate.

4. The petition for writ of certiorari should be denied.

Respectfully Submitted.

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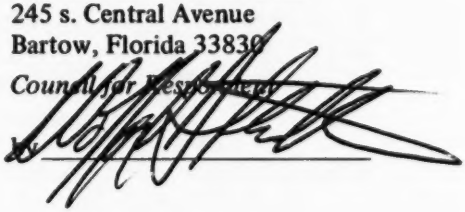

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent was furnished Ernest D. Jackson, Sr., 410 Broad Street, Suite 208, Jacksonville, Florida 32202, and Releford McGriff, 1042 Broad Street, Jacksonville, Florida 32202, counsel for petitioners, by mail, this 18 day of January, 1974.

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